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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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12 PATRICIA HUITT,

13 Plaintiff,

14 v.

15 TEVA PHARMACEUTICALS USA, INC.,
16 TEVA WOMEN'S HEALTH LLC; TEVA
WOMEN'S HEALTH INC. et al.,

17 Defendants.

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1 can be granted under Federal Rule of Civil Procedure 12(b) (6).
 2 ("Mots. to Dismiss" (Docket Nos. 9, 12).)

3 I. Factual and Procedural Background

4 Plaintiff was implanted with a ParaGard IUD in 2016.
 5 (See Compl. at ¶ 48) (Docket No. 1). In April 2018, plaintiff
 6 went to have the ParaGard IUD removed in Sacramento, California.
 7 (Id. at ¶ 50.) An ultrasound of plaintiff's pelvis revealed that
 8 the ParaGard IUD was mispositioned. (See id.) Plaintiff's
 9 healthcare provider attempted to remove the ParaGard IUD as
 10 instructed by Teva. (Id. at ¶ 51.) However, only a portion of
 11 the ParaGard IUD was retrieved, with one arm missing. (Id.) On
 12 May 10, 2018, plaintiff's physician removed the ParaGard IUD arm
 13 via hysteroscope. (Id. at ¶ 52.) Plaintiff alleges that neither
 14 she nor her doctors were provided with warnings from the
 15 defendants of the risk of ParaGard IUD failure and injury or
 16 adequate warning about the risks in removing the ParaGard IUD.
 17 (Id. at ¶ 53.) As a result, plaintiff claims that she has
 18 suffered significant bodily and mental injuries, pain and
 19 suffering, loss of earnings and earning capacity, and has
 20 incurred and will incur medical expenses. (Id. at ¶ 56.)

21 On May 11, 2020, plaintiff brought this action against
 22 defendants alleging: (i) negligence, (ii) strict liability design
 23 defect, (iii) strict liability manufacturing defect, (iv) strict
 24 liability failure to warn, (v) common law fraud, (vi) negligent
 25 misrepresentation, (vii) breach of express warranty, (viii)
 26 breach of implied warranty, (ix) violation of consumer protection
 27 laws, (x) gross negligence, and (xi) seeking punitive damages.
 28 (See generally Compl.)

1 II. Legal Standard

2 Federal Rule 12(b) (6) allows a defendant to assert a
 3 defense by motion for "failure to state a claim upon which relief
 4 can be granted." Fed. R. Civ. P. 12(b)(6). The inquiry before
 5 the court is whether, accepting the allegations in the complaint
 6 as true and drawing all reasonable inferences in the plaintiff's
 7 favor, the plaintiff has stated a claim to relief that is
 8 plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678
 9 (2009). "The plausibility standard is not akin to a 'probability
 10 requirement,' but it asks for more than a sheer possibility that
 11 a defendant has acted unlawfully." Id. at 678. "Threadbare
 12 recitals of the elements of a cause of action, supported by mere
 13 conclusory statements, do not suffice." Id. Rather, "[w]hile
 14 legal conclusions can provide the framework of a complaint, they
 15 must be supported by factual allegations." Id. at 679.

16 A statute of limitations defense "may be raised by a
 17 motion for dismissal or by summary judgment motion." Jablon v.
 18 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). "If the
 19 running of the statute is apparent on the face of the complaint,
 20 the defense may be raised in a motion to dismiss." Id. If
 21 relief is barred by the applicable statute of limitations, "the
 22 complaint is subject to dismissal for failure to state a claim .
 23 . ." Jones v. Bock, 549 U.S. 199, 215 (2007).

24 III. Discussion

25 California law supplies the statute of limitations to
 26 be applied in a diversity action on state law claims. See
 27 Yenidunya Invs., Ltd. v. Magnum Seeds, Inc., No. 2:11-1787 WBS
 28 CKD, 2011 WL 5241350, *3 (E.D. Cal. Oct. 3, 2011) (citing Walker

1 v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980)). California
 2 Code of Civil Procedure § 335.1 establishes a two-year statute of
 3 limitations for an action for personal injury caused by the
 4 alleged wrongful act or negligence of another. See Cal. Code
 5 Civ. Proc. § 335.1. This limitations period on personal injury
 6 claims based upon defective products applies to all causes of
 7 action asserted in a personal injury action, regardless of the
 8 legal theory invoked. Eidson v. Medtronic, Inc., 981 F. Supp. 2d
 9 868, 893 (N.D. Cal. 2013) (citing Soliman v. Philip Morris Inc.,
 10 311 F.3d 966, 971 (9th Cir. 2002)).

11 Defendants initially contended that plaintiff's cause
 12 of action accrued "in April 2018, and certainly no later than May
 13 10, 2018." (See Teva Pharmaceutical USA's Mot. to Dismiss at 14
 14 ("Teva USA's MTD") (Docket No. 12).) Defendants argue that
 15 because plaintiff did not file her complaint until May 11, 2020,
 16 her claims are time-barred under California Code of Civil
 17 Procedure § 335.1. (Id.) However, May 10, 2020, was a Sunday.
 18 Pursuant to California Code of Civil Procedure § 12(a), "if the
 19 last day for the performance of any act provided or required by
 20 law to be performed within a special period of time is a holiday,
 21 then that period is hereby extended to and including the next day
 22 that is not a holiday." See Cal. Code Civ. Proc. § 12(a).
 23 California Code of Civil Procedure § 10 explains that "[h]olidays
 24 within the meaning of the code are every Sunday and any other
 25 days that are specified." See Cal. Code Civ. Proc. § 10.
 26 Therefore, if plaintiff's cause of action accrued on May 10,
 27 2018, when the embedded arm of her ParaGard IUD was removed, she
 28 is not time-barred under the two-year statute of limitations.

1 Defendants now withdraw their argument that the claim
 2 "certainly accrued no later than May 10, 2018," (see Teva USA's
 3 MTD at 14), and instead emphasize that plaintiff's claims accrued
 4 in April 2018 and should be time-barred under the statute of
 5 limitations based on that date. (See Reply in Supp. of Mot. to
 6 Dismiss at 3 ("Reply") (Docket No. 17).) Accordingly, in order
 7 to determine whether plaintiff's complaint is time-barred, the
 8 court must analyze when plaintiff's cause of action accrued.

9 A. Accrual

10 Generally speaking, "a cause of action accrues at 'the
 11 time when the cause of action is complete with all of its
 12 elements.'" See Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th
 13 797, 806 (2005) (citing Norgart v. Upjohn Co., 21 Cal. 4th 383,
 14 397 (1999)). The elements of a cause of action are generically
 15 referred to by sets of terms like wrongful conduct, causation,
 16 and injury or harm. See Norgart, 21 Cal. 4th at 397. In both
 17 negligence and strict liability products liability claims, such
 18 as those at issue here, "the last element to occur is generally,
 19 as a practical matter, the injury to the future plaintiff." See
 20 Fox, 35 Cal. 4th at 809.

21 Defendants contend that plaintiff's cause of action
 22 accrued in April 2018 because her claims are all premised on her
 23 alleged injury resulting from the breakage of her ParaGard IUD
 24 during its removal. (See Reply at 5.) Plaintiff claims that she
 25 "suffered from having a broken arm of the ParaGard in her,
 26 causing her damage" (Compl. at ¶ 62.) She alleges that
 27 the ParaGard IUD was defective and unreasonably dangerous because
 28 it "can and does cause serious harm to the individuals who use

1 it, due to the risk of ParaGard's arm breaking upon removal."

2 (See Compl. at ¶ 41.) Plaintiff also states that had defendants'

3 adequately warned about the risks of ParaGard, her physicians

4 "would have changed the way they warned Plaintiff about the signs

5 and symptoms of serious adverse side effects of ParaGard, and

6 discussed with Plaintiff the true risks of arm breakage and

7 resulting injuries and complications." (Id. at ¶ 59.)

8 Under plaintiff's theory, her cause of action accrued

9 when the remaining arm of the ParaGard was removed on May 10,

10 2018 and that this constituted a separate injury. (See Pl.'s

11 Opp. to Defs' Mots. to Dismiss ("Opposition") at 5 (Docket No.

12 14).) Plaintiff invokes Aryeh v. Canon Business Solutions, 55

13 Cal. 4th 1185 (2013), in support of her contention that her claim

14 is subject to the continuing violation or continuous accrual

15 exception to the statute of limitations. (See Opposition at 3-

16 5.) The continuing violation doctrine "aggregates a series of

17 wrongs or injuries for purposes of the statute of limitations,

18 treating the limitations period as accruing for all of them upon

19 commission or sufferance of the last of them." Aryeh, 55 Cal.

20 4th at 1192. Under the theory of continuous accrual, a series of

21 wrongs or injuries may be viewed as each triggering its own

22 limitations period, "such that a suit for relief is partially

23 time-barred as regards older events but timely as to those within

24 the applicable limitations period." Id.

25 The continuing violations and continuous accrual

26 doctrines are not applicable here. Both the continuing violation

27 and continuous accrual doctrines are triggered by ongoing conduct

28 of the defendant. See Rattagan v. Uber Tech., Inc., No. 19-cv-

1 01988-EMC, 2020 WL 4818612, *6 (N.D. Cal. 2020) (citing Richards
 2 v.CH2M Hill, Inc., 26 Cal. 4th 798, 812 (2001).) The removal of
 3 the ParaGard arm in May 2018 was not a separate act by defendants
 4 which would trigger either of these doctrines. Rather, it was at
 5 most continuing injury from the breakage of the ParaGard IUD upon
 6 removal in April 2018. As California courts have explained, "if
 7 continuing injury from a completed act generally extended the
 8 limitations periods, those periods would lack meaning. Parties
 9 could file suit at any time, as long as their injuries
 10 persisted." Vaca v. Wachovia Mortgage Corp., 198 Cal. App. 4th
 11 737, 745 (4th Dist. 2011). Because the removal of the remaining
 12 arm of plaintiff's ParaGard IUD in May 2018 is better viewed as a
 13 continuing injury, the court agrees with defendants that
 14 plaintiff's cause of action accrued in April 2018, absent the
 15 application of a tolling principle such as the discovery rule.

16 B. Discovery Rule

17 Plaintiff relies on the discovery rule to argue the
 18 statute of limitations did not run on her claims prior to filing
 19 suit. (See Compl. at ¶¶ 63-67.) The discovery rule "postpones
 20 accrual of a cause of action until the plaintiff discovers, or
 21 has reason to discover, the cause of action." See Fox, 35
 22 Cal.4th at 807. A plaintiff has reason to discover a cause of
 23 action when she at least suspects a factual basis for its
 24 elements or an act of wrongdoing by the defendant. See Norgart,
 25 21 Cal. 4th at 406. In order to rely on the discovery rule for
 26 delayed accrual of a cause of action, a plaintiff whose complaint
 27 shows on its face that their claim would be time-barred without
 28 the discovery rule must specifically plead facts to show "(1) the

1 time and manner of discovery and (2) the inability to have made
 2 earlier discovery despite reasonable diligence." See Fox, 35
 3 Cal.4th at 808. In assessing the sufficiency of the allegations
 4 of delayed discovery, "the court places the burden on the
 5 plaintiff to show diligence." Id. "Conclusory allegations will
 6 not withstand demurrer." Id.

7 Here, plaintiff fails to specifically plead facts under
 8 both prongs of the Fox test. For example, plaintiff merely
 9 states that the nature of her injuries and damages and their
 10 relation between the "ParaGard IUD and Defendants' wrongful
 11 conduct was not discovered and could not be discovered until a
 12 date within the applicable statute of limitations." (See Compl.
 13 at ¶ 65.) This does not describe the manner of her discovery or
 14 provide a certain time at which she discovered the connection
 15 between Teva and her injuries. Plaintiff likewise does not give
 16 any details as to her "diligent investigation" other than stating
 17 that she consulted with her medical providers. (Id.)

18 Eidson v. Medtronic, Inc. is particularly illustrative
 19 here. In Eidson, the plaintiffs likewise sought to invoke the
 20 discovery rule in a personal injury action. See Eidson, 981 F.
 21 Supp. at 893. They did so by stating that despite diligent
 22 investigation into the cause of their injuries, including
 23 consultations with medical providers, "the nature of [their]
 24 injuries and damages, and their relationship to [defendant] was
 25 not discovered, and through reasonable care and diligence could
 26 not have been discovered" until a date within the statute of
 27 limitations. Id. The court held such statements were conclusory
 28 and that plaintiffs failed to meet their burden of sufficiently

1 pleading facts to illustrate that they deserved the benefit of
 2 the discovery rule. Id. at 894. Plaintiff in this case, using
 3 almost identical language to that deemed insufficient in Eidson,
 4 has likewise failed to allege enough facts to satisfy the
 5 pleading requirements of the discovery rule. However, under
 6 Federal Rule of Civil Procedure 15, leave to amend "should be
 7 freely granted when justice so requires." Id. at 894 (citing
 8 Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)).
 9 Accordingly, the court will grant defendants' motions to dismiss.

10 IT IS THEREFORE ORDERED that defendants' motions to
 11 dismiss (Docket Nos. 9 and 12) be, and the same hereby are,
 12 GRANTED. Plaintiff's claims are DISMISSED WITHOUT PREJUDICE with
 13 leave to amend to allege additional facts regarding discovery
 14 within 20 days of this order.¹ Failure to cure the deficiencies
 15 identified in this order will result in dismissal of the
 16 complaint with prejudice.

17 Dated: September 22, 2020



18 WILLIAM B. SHUBB
 UNITED STATES DISTRICT JUDGE

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21

22 ¹ For the first time in oral argument, without even a
 23 passing mention of it in her complaint or opposition brief
 24 plaintiff cited to Emergency Rule 9, which was enacted by the
 25 Judicial Council of California on April 6, 2020 due to the COVID-
 26 19 pandemic. See Judicial Council of California, Amended Cal.
 27 Rules of Court, Emergency Rule 9. This rule purports to suspend
 28 from "April 6, 2020, until October 1, the statutes of limitation
 and repose for civil causes of action that exceed 180 days." See
 Emergency Rule 9. When plaintiff amends her complaint, if she
 wishes to rely on this rule, she must make it evident in her
 complaint so that she does not take both the court and opposing
 counsel by surprise again.